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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 417

ARTHUR A. YURDIN, BEATRICE W. YURDIN, IRVING S. MOORIN and PHYLLIS MOORIN,
Petitioners,

vs.

TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD and TURNPIKE ASSOCIATES, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

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TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD and TURNPIKE ASSOCIATES, INC.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioners, Arthur A. Yurdin, Beatrice W. Yurdin, Irving S. Moorin and Phyllis Moorin, pray that a writ of Certiorari issue to review the judgment of the Supreme Court of Errors of the State of Connecticut, rendered in this cause on July 8, 1958.

I.

Opinion Below.

The opinion of the Court of Common Pleas for the County of Fairfield, is found in the record, page 5.

The opinion of the Supreme Court of Errors of the State of Connecticut is reproduced in the Appendix at page 18a. This opinion is reported at 145 Conn. 416.

II.

Statement of the Case.

On August 20, 1956, the Respondent, Turnpike Associates, Inc., filed a petition with the Town Plan and Zoning Commission of the Town of Fairfield, requesting a change of zone of certain property located on Black Rock Turnpike, in the Town of Fairfield, State of Connecticut. Thereafter, the Respondent, Town Plan and Zoning Commission, on its own motion, proposed the change of zone of an area located on Black Rock Turnpike, larger than the parcel owned by the Respondent, Turnpike Associates, Inc., and including this parcel within the dimensions of the larger area. On September 19, 1956, pursuant to publication and notice, a public hearing was held by the Respondent, Town Plan and Zoning Commission, on both the application of the Respondent, Turnpike Associates, Inc., and the proposal of the Commission itself.

This hearing was held pursuant to the provisions

of Section 375d of the 1955 Supplement to the General Statutes of the State of Connecticut, more specifically set out in the Appendix hereto at page 14a.

Both the Petitioners and the Respondent, Turnpike Associates, Inc., presented evidence and arguments at this public hearing. On September 26, 1956, the Respondent, Town Plan and Zoning Commission, held an executive session at which attendance by the public was foreclosed. At this executive session, the Commission received and considered certain additional evidence, exhibits and testimony not referred to or introduced at the public hearing. The testimony was given by Mr. Robert S. Bryan, the Planning Director of the Town of Fairfield, and Mr. James Lee, the Town Planning Technician, neither of whom was a member of the Commission. Among the evidence and exhibits considered for the first time at this closed meeting were the following:

Exhibit 26—Report #7 on population.

Exhibit 27—Report #9 on industry.

Exhibit 30—Town map of commercial zones and institutional land.

Exhibit 31—U. S. G. S. map of metropolitan area.

Exhibit 33—Map of areas in existing and potential development study.

Exhibit 36—Study of business land areas on Black Rock Turnpike.

Exhibit 38—Mounted master plan map of dwelling unit distribution.

Exhibit 41—Three rough sketches of possible relocation of Black Rock Turnpike.

Exhibit 42—Sketch of development possible on existing 200 foot depth.

Exhibit 43—Table of areas of Fairfield zones.

See Appendix, page 1a-14a. The testimony of Bryan and Lee is set forth more fully in the Appendix, pages 1a, 2a, 3a, 4a. No opportunity was afforded the Petitioners to know the nature of the evidence, arguments and opinions thus presented, nor to meet the same, nor to cross-examine the offerors of such opinions.

After receiving and considering said evidence, exhibits and testimony in executive session, the Commission adopted the change of zone proposed by the Commission. An appeal from the decision of the Commission was then taken by the Petitioners to the Court of Common Pleas for Fairfield County by writ, summons and complaint dated October 8, 1956. A copy of this complaint and responsive pleadings directed thereto are found in the Record, pages 1-5.

Acting pursuant to Section 379d of the 1955 Supplement to the General Statutes of the State of Connecticut, (see Appendix page 16a) the Respondent, Town Plan and Zoning Commission, returned all of the evidence considered by it in reaching its decision to the Court of Common Pleas. Such return constituted the record in the case. Included in this evidence were the exhibits hereinbefore noted. On the hearing of the appeal, the attorney for the Respondent introduced each of 43 separate items contained in the return, many of which, admittedly,

were not in evidence at the public hearing. (See Appendix, page 6a.) It also appeared for the first time at the hearing of the appeal, that the Commission had consulted the witnesses above-mentioned in the executive session.

Objections and exceptions to the introduction of this evidence were made promptly and noted in the Record. (See Appendix, page 9a.) The Petitioners cited Article 14, Section 1, of the Constitution of the United States, and claimed that they had been denied a fair hearing, in that the Commission had improperly received and considered the evidence referred to above. This claim was overruled by the Trial Court and judgment was entered sustaining the decision of the Commission, and dismissing the appeal of the Petitioners therefrom on March 13, 1957. See Record, page 5.

The Petitioners then took an appeal to the Supreme Court of Errors of the State of Connecticut, relying in part upon the constitutional question described above. See Record, pages 11, 14. In the argument of this case in the Supreme Court of Errors, the Petitioners pursued this question in detail. See Appendix, page 22a. The Supreme Court of Errors of the State of Connecticut sustained the decision of the Court of Common Pleas.

No petition for rehearing in the Supreme Court of Errors of the State of Connecticut was filed.

III.

Jurisdiction.

The judgment of the Supreme Court of Errors of the State of Connecticut was entered on July 8, 1958, and rehearing was not sought. The judgment of the Supreme Court of Errors of the State of Connecticut, dated July 8, 1958, in this cause was a final judgment of the highest court of the State in which a decision in this case could be had. There was especially claimed under the Constitution of the United States, a title, right, privilege or immunity. The stage in the proceedings in the Court of Common Pleas for Fairfield County, the Trial Court, at which, and the manner in which, the federal question sought to be reviewed, was raised, is as follows:

At the hearing of the appeal before the Court of Common Pleas, when counsel for the Respondent, Town Plan and Zoning Commission, sought to introduce certain evidence not presented at the public hearing of the Commission, timely objection was made. The Petitioners specifically referred to Article 14, Section 1, of the United States Constitution, as forming the basis of this objection. See Appendix, page 14a.

The stage in the proceedings in the Supreme Court of Errors at which, and the manner in which, the federal question sought to be reviewed, was raised, is as follows:

The Petitioners pursued the federal question by assigning it as error of the Court of Common Pleas and by brief and oral argument before the Supreme

Court of Errors of the State of Connecticut. See Record, page 12.

The Court of Common Pleas refused to consider the federal question presented. See Memorandum of Decision, Record, page 5. The Supreme Court of Errors rejected it as a ground for overruling the judgment of the Court of Common Pleas. See decision of Supreme Court of Errors, Appendix, page 18a.

IV.

Questions Presented.

The questions presented herein are:

1. Was the reception and consideration of evidence by the Respondent, Town Plan and Zoning Commission, in executive session, without affording the Petitioners an opportunity to meet and rebut such evidence, and to cross-examine the offerors thereof, a denial of Petitioners' right to a fair hearing as guaranteed by Article 14, Section 1, of the Constitution of the United States?

2. If the proceedings conducted herein by the Respondent, Town Plan and Zoning Commission, complied with Section 375d of the 1955 Supplement to the General Statutes of the State of Connecticut, does this statute then violate Article 14, Section 1, of the United States Constitution, in that the Petitioners were thereby deprived of their property without due process of law?

V.

Reasons for Granting Writ.

The Respondent, Town Plan and Zoning Commission, conducted a closed meeting some seven days after the public hearing at which only members of the Commission, the Town Planning Director and the Town Planning Technician were present. Considerable time was there devoted to the consideration of reports on population and industry; maps of commercial zones and institutional land; of potential development areas; of business land areas on Black Rock Turnpike; of unit distribution; and of rough sketches of possible relocations of Black Rock Turnpike. See Appendix, pages 1a-5a. In addition, the Town Planning Director and the Town Planning Technician explained and discussed various aspects of these exhibits. See Appendix, pages 1a-5a. That these maps, studies and testimony weighed heavily in the decision made by the Commission, is shown both in the Minutes of the executive session (see Appendix, pages 1a-5a) and in the Commission's reasons for its decision. See Record, page 4. None of these exhibits was presented, discussed, or explained at the public hearing on September 19, 1956; none had been officially adopted by the Commission prior to the executive session of September 26, 1956; and although both the Town Planning Director and the Town Planning Technician were present at the public hearing, neither was called upon to testify there. Thus, although these exhibits and testimony became a part of the record, the Petitioners, as owners of property adjacent to and nearby the land thus rezoned, were never given the opportunity of

rebutting the material, of cross-examining its authors, or of even knowing what the Commission was considering, until such evidence came forth at the hearing of the appeal in the Court of Common Pleas."

Connecticut courts have long held that an interested party at a public hearing is entitled to learn what evidence the commission was considering. **Jennings vs. Conn. Light & Power Co.**, 140 Conn. 650; 103 A. 2d 535 (1954).

In **Wadell vs. Board of Zoning Appeals**, 136 Conn. 1; 68 A. 2d 152 (1949) the Court stated:

> "A denial of a right to cross-examine may easily lead to the acceptance of testimony at its face value, when its lack of credibility or the necessity for accepting it only with qualifications can be shown only by cross-examination."

Likewise, in **Parsons vs. Board of Zoning Appeals**, 140 Conn. 290 at 293, 99 A. 2d 149 (1953) the Court stated that the parties were entitled as a right "to be fairly apprised of the facts upon which the board is asked to act."

It might be argued that the present case involves a quasi-legislative hearing as distinguished from an administrative hearing, and that the procedural safeguards required in administrative hearings are not applicable. However, the Supreme Court of Errors of the State of Connecticut has recognized that the activities of a Plan and Zoning Commission cannot be categorized into convenient pigeon holes. "The modification of zoning regulations partakes of the

nature of a legislative proceeding; nevertheless, it is not legislative in the broad sense, on the contrary the power emanates from a specific grant and the manner of its exercise is limited. The mode of exercising the power thus expressly granted must be reasonable. The exercise of power of that nature, whether it be denominated, legislative, or quasi-judicial, should command the highest public confidence . . . " **Mills vs. Town Plan and Zoning Commissibn of the Town of Windsor,** 144 Conn. 493; 134 A. 2d 250 (1957). Likewise, in the case of **Beach vs. Planning and Zoning Commission of the Town of Milford,** 141 Conn. 79; 103 A. 2d 814 (1954) the Court recognized that such a Commission acts in an administrative rather than a legislative capacity in exercising its function of approving subdivision plans.

Thus, we see that a commission of this type is capable of acting in a legislative, quasi-legislative, quasi-judicial or administrative capacity.

It is the contention of the Petitioners that if this same proposal were brought before the Zoning Board of Appeals, the same end results could have been accomplished by obtaining a waiver of zoning requirements. In that event, there could be no question but that the Zoning Board of Appeals would be acting in an administrative capacity and that the Petitioners would have been entitled to have been apprised of all of the evidence which such a board received and considered.

Slagle vs. Zoning Board of Appeals, 144 Conn. 690; — A. 2d — (1957).

Wadell vs. Board of Zoning Appeals, supra.

It would certainly seem less than just that the Respondent, Turnpike Associates, Inc., merely by choosing the forum before which it presented its proposal, could deprive the neighboring property owners of their rights to a full hearing in the due process connotation of the word.

Mrowka vs. Board of Zoning Appeals, 134 Conn. 149 at 154; 55 A. 2d 909 (1954).

Parsons vs. Board of Zoning Appeals, supra.

It is of particular importance to note that the Commission in this instance occupied the unique position of proponent, judge and witness, all simultaneously, and therefore should have been most scrupulous in exercising the safeguards due the Petitioners in this case.

The premise above stated has been so firmly implanted in Anglo-American jurisprudence as to remove all doubts of its applicability to administrative or quasi-judicial proceedings, as in the case at hand. As stated by Frankfurter, J., in **Federal Communications Commission vs. Pottsville Broadcasting Co.**, 309 U.S. 134, S. Ct. 437, 84 L. Ed. 656 (1940), "Procedure of administrative trials must observe the fundamentals of fair play, which require the interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." Further, in **Shields vs. Utah, Idaho Railway Co.**, 305 U.S. 177, 59 S. Ct., 160, 83 L. Ed. 101 (1938), the Court, by Hughes, C. J., stated, "The parties affected by the determination of an administrative body are entitled to insist on compliance with the requirements of due process." These "re-

quirements of due process" and the "fundamentals of fair play" denied the Petitioners by the Respondent, Town Plan and Zoning Commission of the Town of Fairfield, are more specifically set forth in the following cases:

Ohio Bell Telephone Co. vs. Ohio P. U. C., 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1936),

in which plaintiff reversed the decision of the Ohio Supreme Court and the P. U. C., decreeing a refund to subscribers. The commission had taken notice of general price trends in the area at executive session without giving the plaintiff an opportunity to explain or rebut them. The opinion, by Cardozo, J., bases the reversal on the denial of an opportunity to introduce new evidence or rebut old on appeal, as well as the denial to plaintiff of the opportunity of cross-examining at the hearing. Note the striking similarity to the case at hand, wherein Petitioners first became aware of the Commission's use of extraneous material in the hearing of the appeal before the Court of Common Pleas. Cardozo, in the **Ohio Bell** case, states, "It is a denial of the fundamentals of a trial when a commission reaches a decision on evidential facts not spread upon the record and upon information secretly collected and not disclosed which the party complaining had had no opportunity to examine or analyze, explain or rebut."

These basic tenets of procedural due process—that nothing can be treated as evidence which is not introduced as such—that administrative officers who are required to make a determination after a hearing, in the exercise of judicial or quasi-judicial functions, cannot act on their own information as could

jurors in primitive days, but must fully apprise all parties of the evidence submitted or to be considered —and that a hearing which precedes the taking of property is not a mere form, but should give opposing parties a right and opportunity by brief and argument to controvert the claims asserted against it before a tribunal bound to listen and give legal effect to what has been established, are so firmly ingrained in our law as to be a corner stone of our jurisprudential structure.

Baltimore & Ohio R. Co. vs. U. S., 264 U.S. 588; 44 S. Ct. 317, 68 L. Ed. 667 (1924).

U. S. vs. Abilene & S. R. Co., 265 U.S. 274, 44 S. Ct. 565, 68 L. Ed. 1016 (1925).

Crowell vs. Benson, 285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932).

Morgan vs. U. S., 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

I. C. C. vs. Louisville & N. R. Co., 227 U.S. 88, 33 S. Ct. 185, 57 L. Ed. 431 (1912).

Wash. ex. rel. Oregon R. & Nav. Co. vs. Fairchild, 224 U.S. 510, 32 S. Ct. 535, 57 L. Ed. 431 (1910).

18 ALR 2d ANNO. 552, at 555.

There can be no question in the light of the facts stated above that the constitutional safeguards provided to protect the individual from the steam roller tactics used by the Respondent, Town Plan and Zoning Commission, herein were observed primarily in the breach. The immediate and direct relevance of the above cited cases to the instant case is at once

obvious and shocking. The explicit directives of this Court are at odds with the actions of the Respondent, Town Plan and Zoning Commission.

If, as the Supreme Court of Errors of the State of Connecticut, states in its opinion, "The Commission did not exceed its authority or violate any rights of the plaintiffs when it heard the reports and population maps explained by the trained personnel who prepared them for the Commission," (see Appendix, page 22a) then it is the contention of the Petitioners that Section 375d of the 1955 Supplement of the General Statutes of Connecticut, as interpreted by that Court, is blatantly unconstitutional. Section 375d requires " A public hearing . . . at which parties in interest and citizens shall have an opportunity to be heard." Such a public hearing cannot be merely form. **Couch vs. Zoning Commission of the Town of Washington,** 141 Conn. 349; 106 A. 2d 173 (1954). The word "hearing," as used in this section, must mean a hearing in the due process connotation of the word requiring notice, an opportunity to be present, and an opportunity to note and meet the evidence presented.

Counsel for Respondent, Town Plan and Zoning Commission, admitted that the Commission committed the acts and omissions complained of above at the hearing of the appeal in the Court of Common Pleas. See Appendix, page 7a. The issue then is whether the legislature has the power to deprive citizens of their property without the safeguards required and guaranteed by Article 14, Section 1, of the Constitution. In other words, the Petitioners contend that they have been deprived of a valuable

property right, in that land adjacent to and nearby their homes has been rezoned from residential to business, thereby decreasing the value of their property. The rezoning took place as the result of a decision by the Zoning Commission, based substantially upon evidence received by it in executive and closed session. The Petitioners had no opportunity to know or to rebut this evidence. The Connecticut statute referred to above requires that a public hearing be held, and it is submitted that the type of hearing conducted in the instant case is by no stretch of the imagination a public hearing in the constitutional sense of a hearing, with the attributes of due process.

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown but presumptively sufficient information to support the finding." **Interstate Commerce Commission vs. Louisville & Nashville R. Co.**, 227 U.S. 88, 93; 88 S. Ct. 185 (1913); **Jaffe vs. State Department of Health**, 135 Conn. 339; 64 A. 2d 330 (1949); **Wadell vs. Board of Zoning Appeals**, 136 Conn. 1; 68 A. 2d 152 (1949).

If the hearing provided for by the Connecticut

legislature in Section 375d need not meet the standards required by the Constitution, it is the Petitioners' contention that such a hearing would at once be illegal, shocking and repugnant to the United States Constitution. The Petitioners submit that such an interpretation and application of this statute violates their right to a fair hearing under Article 14, Section 1, of the United States Constitution.

The Petitioners present to this Court and attach herewith, as an exhibit hereof, the duly certified transcript of this case as the same appears in the Supreme Court of Errors of the State of Connecticut.

VI.

Conclusion.

WHEREFORE, the Petitioners pray that a Writ of Certiorari issue to the Supreme Court of Errors of the State of Connecticut for the reasons stated.

Dated at Bridgeport, this 30 day of Sept. A.D. 1958.

Respectfully submitted,

GEORGE A. SADEN,
Counsel for Petitioners.

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APPENDIX.

I THE FOLLOWING ARE EXCERPTS FROM THE MINUTES OF THE EXECUTIVE SESSION OF THE DEFENDANT COMMISSION.

The following are excerpts from the minutes of the Executive Session of the defendant commission held on September 26, 1956.

Mr. Bryan noted that at the public hearing on September 19, 1956, a folder was presented to each member of the Commission containing the agenda of that meeting, copies of the legal advertisements published in the newspaper, tables and maps presenting a study of retail sales of Fairfield County towns and the Bridgeport area and a revised census of walk-in retail business establishments in Fairfield dated September 19, 1956. Mr. Bryan noted that the retail sales study and the census of retail businesses supplement Report #11, **Outline for a Business Land Use Plan.** Mr. Bryan noted that each member of the Commission tonight was presented with a list of exhibits pertaining to these Black Rock Turnpike business proposals and that each of these exhibits are either on display in the room or is available in the room.

* * * * *

Mr. Bryan then displayed the mounted map prepared by Technical Planning Associates in 1948 and showing the distribution of existing dwelling units. The Commission members noted the contrast between the dwelling units in the northeast portion of

Town in 1948 **and the dwelling units shown on the new dot map on display.**

The Commission then reviewed the findings of Report #7 **Population and Residential Growth,** Report #9 **Outline for Industrial Land Use Plan,** Report #11 **Outline for Business Land Use Plan** and Report #12 **Fairfield Growth.** The Commission then studied the United States Geological Survey map of the Bridgeport Metropolitan Area, and Mr. Bryan noted the major highways in and around Fairfield and the major business areas affecting the Town of Fairfield.

Mr. Bryan then displayed and explained for the Commission the 200 scale land use maps of the Black Rock Turnpike area, the 200 scale topographic map of the area under consideration tonight and the general plan for the development of business areas on Black Rock Turnpike as considered by the Commission at an informal meeting on February 2, 1955.

Mr. Bryan then explained a population study **which he and Mr. Lee prepared.** He called the Commission's attention to the map outlining in red the minimum area which would be served by shopping facilities on Black Rock Turnpike. The map with its acetate overlay shows the distribution of dwelling units in the area outlined in red. Mr. Bryan said that in this area, outlined in red, are 3,268 dwelling units with an estimated population of 10,784, at 3.3 persons per dwelling unit. This outlined area, he said, has a potential development of 4,091 dwelling units and a total population of 13,500 persons. Mr. Bryan then displayed a small map of the Town,

showing a much larger area in the northeast part of Fairfield which might be served by substantial shopping facilities in the Black Rock Turnpike area. This map showed eleven districts lettered from "A" through "K," and he noted that the existing dwelling units in these districts total 5,194 with an estimated population of 17,140. These areas, he said, when fully developed under existing zoning, can contain 9,593 houses and a total population of about 32,000.

* * * * *

Mr. Bryan and Mr. Lee then discussed with the Commission three alternate plans for the development of a community shopping center on Black Rock Turnpike. As the first alternate, Mr. Lee explained that it is possible to establish such a community shopping center on the land now zoned for retail business use. He presented a sketch of a building housing a group of stores the size of the Grand Union block in Fairfield Center, and noted that this building could be built on the existing 200 feet of depth on the southwest side of Black Rock Turnpike. He noted that the plan included a parking ratio of three to one, sufficient space for landscaping and all parking facilities within 300 feet of the building. Such a plan, he said, however, provides no space for expansion, and is dependent upon the difficult assembly of properties which are now in separate ownerships. Similar blocks could be built on the northeast side of Black Rock Turnpike and on Black Rock Turnpike north of Stillson Road. The development of these additional blocks in this manner, he said, would not lead to the unified type of shopping development thought desirable today.

Mr. Lee described the second alternative as being the adoption of the proposals under consideration tonight and perhaps the ultimate contraction of the business zoning as proposed in the general plan considered in 1955.

As a third alternative, Mr. Lee suggested that the concentration of area for retail business development could be achieved by relocating Black Rock Turnpike to the southwest, near Stillson Place or to the northeast, near Barry Scott Drive. He presented two sketches of the relocation possibilities. He noted that the possibility of relocating Black Rock Turnpike is fairly remote.

Mr. Bryan explained that these three alternatives are intended to show possible choices for the development of a Community shopping center. The third alternative, he said, seems most remote. He said that the first alternate is not likely to result in the unified development of shopping buildings due to the minimum depth of the commercial zones and the great diversity of property ownerships. In the long run, he said, this first alternate will still result in the lack of concentration of shopping facilities and what amounts to a string of businesses along Black Rock Turnpike.

The following items were presented for the first time at the executive session:

Exhibit 26—Report #7 on population.

Exhibit 27—Report #9 on industry.

Exhibit 30—Town map of commercial zones and institutional land.

Exhibit 31—U. S. G. S. map of metropolitan area.

Exhibit 33—Map of areas in existing and potential development study.

Exhibit 36—Study of business land areas on Black Rock Turnpike.

Exhibit 38—Mounted master plan map of dwelling unit distribution.

Exhibit 41—Three rough sketches of possible relocations of Black Rock Turnpike.

Exhibit 42—Sketch of development possible on existing 200 foot depth.

Exhibit 43—Table of areas of Fairfield zones.

II THE FOLLOWING ARE EXCERPTS FROM THE HEARING OF THE APPEAL BEFORE HON. SIDNEY A. JOHNSON, JUDGE, IN THE COURT OF COMMON PLEAS, FAIRFIELD COUNTY, ON FEBRUARY 14, 1957.

EXCERPTS OF HEARING.

Appearances:

For the Plaintiffs:

Cohen, Schine & Wolf, by Attorney Austin Wolf.

For the Defendants:

Marsh, Day & Calhoun for Town Plan and Zoning Commission, by Attorney Raymond C. Beckwith.

Friedman & Friedman for Turnpike Associates, by Attorney Arthur Levy.

(Mr. Beckwith, after introducing 25 defendant Town Plan and Zoning Commission Exhibits, attempts to introduce the following, to which there is objection by Mr. Wolf:)

Mr. Beckwith: The next item is the so-called Report Number 7 on population and residential growth, prepared by the Planning Department.

Mr. Wolf: Was that in evidence before the hearing?

Mr. Beckwith: This was before the Commission.

Mr. Wolf: Was it at the public hearing?

Mr. Beckwith: No, I don't believe at the public hearing, but at the executive session.

Mr. Wolf: If Your Honor please, I think that an item not considered at the public hearing, but only at the executive session should be stricken from the record.

Mr. Beckwith: This is an item which the Commission had before it or had access to.

The Court: At the public hearing?

Mr. Wolf: This was not at the public hearing.

Mr. Beckwith: This is a Fairfield Population and Residential Growth report which was prepared some time ago by the Planning office. It is available to the Commission for its guidance in surveying various zoning problems and it was specifically considered by them, though not at the public hearing. It is very similar to Item 10 here.

Mr. Wolf: That was submitted at the specific request of counsel for the opposition, this report was not; we didn't even see this.

The Court: I suppose you could say that is within their knowledge.

Mr. Beckwith: It is part of their knowledge and part of their file.

The Court: But that doesn't say why it wasn't before these people at the hearing.

Mr. Beckwith: I think that is—these people didn't know it existed.

Mr. Wolf: If Your Honor please, I don't think it forms any part of the record; it wasn't in evidence at the public hearing.

Mr. Beckwith: Then, if Your Honor please, if we are going to be bound by evidence that was submitted at the public hearing, there are many things which—

Mr. Wolf: If this sort of thing is to be allowed as evidence, there is no point in having a hearing. They might as well have an executive session and be done with it.

The Court: At this particular point, are there any other things in this return that were at the public hearing and available to these people?

Mr. Beckwith: I will have to check that, Your Honor. If Your Honor please, I am informed that Item 32 was on display at the public hearing and that Item 37 was on display at the public hearing. Item 44 is of course the minutes of the public hearings and that is outside the present inquiry. Items 30 and 31, for example, were in the room at the hearing, on the Commissions' table, but were not publicly displayed.

The Court: I am only concerned with the things that have not been reported.

Mr. Beckwith: Reports 7, 9 and 12, Items 26, 27 and 28 are reports which have been generally promulgated to the public. The first one I take up was an exhibit in four previous zoning cases. The reports are something that the Commission members have read and have access to. I feel that all of this material that bears on the problem is relative to the appeal. It is all material that is prepared at the direction of the Commission to solve zoning questions, to provide for future planning of the town.

The Court: You miss my point. I want a differentia of those items that were there specifically at the public hearing and those that were not; so long as they were in the room and available to the Commission or anybody that comes in, without any qualification. But I think on the other things, in fairness to the citizens who are appealing this case, the record should show that that was not available to them at the hearing.

Mr. Beckwith: Item 26 was not in the room; Item 27 was not in the room.

The Court: Not at the public hearing?

Mr. Beckwith: No. Item 28 was in the room at the public hearing.

Mr. Wolf: Will the Court rule on the two Items 26 and 27?

The Court: Item 26 is a report on the population and was not present at the public hearing?

Mr. Beckwith: That is correct.

The Court: But it was used by the Zoning Commission in executive session?

Mr. Beckwith: That is correct, Your Honor.

The Court: It may be admitted with that qualification.

Mr. Wolf: Objection and exception.

(Exception noted for the plaintiffs.)

Report of Population, marked as Defendant Town Plan and Zoning Commission's Item No. 26 of the file.

Mr. Beckwith: Number 27 is the so-called report Number 9 on Industry. This was not present at the public hearing; it was present and available to the Commission at the executive session.

Mr. Wolf: I make the same objection.

The Court: There is an objection and an overruling of the objection and an exception in all of these items that were not at the public hearing and which were used at the executive session.

Report Number 9 on Industry, marked as Defendant Town Plan and Zoning Commission's No. 27 of the file.

(Objection and exception noted for the plaintiffs.)

* * * * *

Mr. Beckwith: Item Number 30 is a map of commercial zones and institutional land. This was not present at the public hearing, but was present at the executive session.

Mr. Wolf: May I have the same objection and an exception?

The Court: I made that notation.

(Objection and exception noted for the plaintiffs.)

Map of Commercial Zones, marked as Defendant Town Plan and Zoning Commission's Item No. 30 of the file.

* * * * *

Mr. Beckwith: Item Number 31 is a United States Geodetic Survey Map of the area from Milford to Darien. This was on the wall at the executive session. It may or may not have been in the room at the public hearing; I am unable to determine that.

The Court: Supposing you resolve the doubt by saying that it was not at the public hearing, but it was available and in use by the Commission at the executive session.

Geodetic Survey and Map, marked as Defendant Town Plan and Zoning Commission's Item No. 31 of the file.

* * * * *

Mr. Beckwith: If Your Honor please, the next item, which is 33, is a map of areas in existing and potential development study. This was available only at the executive session and it is explained in the executive minutes.

Map of Areas in Existing and Potential Development Study, marked as Defendant Town Plan and Zoning Commission's Item No. 33 of the file.

* * * * *

Mr. Beckwith: No. 36 is a study of business land areas on Black Rock Turnpike. This was not avail-

able at the public hearing; it was available at the executive session.

Study of Business Land Areas on Black Rock Turnpike, marked as Defendant Town Plan and Zoning Commission's Item 36 of the file.

* * * * *

Mr. Beckwith: Item Number 38 is a mounted Master Plan Map of dwelling unit distribution. This was prepared by Technical Planning Associates in 1948, in connection with the preparation of the master plan, which is Item 24 and 25. This was not at the public hearing and was at the executive session.

Mounted Master Plan Map, marked as Defendant Town Plan and Zoning Commission's Item No. 38 of the file.

* * * * *

Mr. Beckwith: Item Number 40 is a book entitled, Shopping Centers, Design and Operation. This was at both the public hearing and the executive session.

Mr. Wolf: May I inquire as to where that was located at the public hearing?

Mr. Beckwith: It was on the judge's dias or counter in the front of the room.

Mr. Wolf: Is that the table at which the Commission was sitting? There was no reference to that book at the time.

The Court: So long as it was there.

Mr. Wolf: That is a pretty large room. This was not located or situated at the table at which the Com-

mission was sitting; this was put on another table or bench in the room beyond the Commission and no reference was made to it at the hearing whatsoever. Was this referred to at the executive session?

Mr. Levy: There was a specific reference made by our expert at the hearing.

The Court: So long as it was present where the public hearing was held—

Mr. Wolf: Even if there is no reference to it whatsoever?

The Court: It comes in.

Mr. Wolf: May we have an objection and exception on that ground also?

The Court: Objection overruled and exception noted.

(Exception noted for the plaintiffs.)

Book of "Shopping Centers, etc." marked as Defendant Town Plan and Zoning Commission's Item No. 40 of the file.

Mr. Beckwith: The next item is 41 which consists of three rough sketches of possible relocation of Black Rock Turnpike. These were not available at the public hearing, they were available at the executive session and they are actually overlays to the display map that is on the wall, they fit over it. May these three map be marked as one?

The Court: Yes, that is 41.

Three Rough Sketches, marked as Defendant Town Plan and Zoning Commission's Item No. 41 on the file.

Mr. Beckwith: The next item is Number 42, which is a sketch of development possible on the zone of 200 feet. This was prepared by the Planning Department and was not available at the Public Hearing, but it was before the Executive Session.

Sketch marked as Defendant Town Plan and Zoning Commission's Item No. 42 of the file.

Mr. Beckwith: Item 43 is a paper showing areas of existing zoning districts as of April 1, 1956. This was before the executive session, but was not before the public hearing.

Summary of Existing Zoning Districts, April 1, 1956, marked as Defendant Town Plan and Zoning Commission's Item No. 43 of the file.

* * * * *

Mr. Wolf: May I make a few brief comments, Your Honor? Part. 1. Paragraph 1 of the complaint, the parties have stipulated that they are admitted. Now in connection with paragraph 4 I would ask that the Court take judicial notice of another case in this court, File Number 64573, George Katona et als vs. Town Plan and Zoning Commission of the Town of Fairfield et als. This case was decided on July 13, 1956 by Judge Leipner. There was a companion case, No. 64786, which may have some bearing on the matter. The first case has the complete record of the first decision in this same case and that becomes important in connection with paragraph 4 of the plaintiffs' complaint.

There are two other things that I would like to bring to the Court's attention. One is in connection with the evidence or the matters considered by the Commission in executive session, but not at the

public hearing, and we wish to state that this violated the constitutional rights of the plaintiffs. I am referring to Article 14, Section 1 of the United States Constitution and Article 1, Section 9 of the Connecticut Constitution; and I do think this should be heard at the first possible time.

* * * * * *

III THE FOLLOWING ARE RELEVANT STATUTES SET OUT FULLY AS CONTAINED IN THE 1955 SUPPLEMENT TO THE GENERAL STATUTES OF THE STATE OF CONNECTICUT.

Sec. 375d. Enforcement of regulations; public hearings; changes. Such zoning commission shall provide for the manner in which such regulations and the boundaries of zoning districts shall be respectively enforced and established and amended or changed. No such regulation or boundary shall become effective or be established until after a public hearing in relation thereto held by the zoning commission or a committee thereof appointed for that purpose consisting of at least five members at which parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be published in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days before such hearing, and a copy of such proposed regulation or boundary shall be filed in the office of the town, city or borough clerk, as the case may be, in such muni-

cipality for public inspection at least ten days before such hearing; and may be published in full in such paper. Such regulations and boundaries may, from time to time, be amended, changed or repealed by such zoning commission by a majority vote of the commission, except as otherwise provided herein. If a protest is filed at such hearing with the zoning commission against such change signed by the owners of twenty per cent or more of the area of the lots included in such proposed change, or of the lots within five hundred feet in any direction of the property included in the proposed change, such change shall not be adopted except by a vote of three-fourths of all the members of the zoning commission. The provisions of this section relative to public hearings and official notice shall apply to all changes or amendments. Zoning regulations or boundaries or changes therein shall become effective at such time as may be fixed by the zoning commission, provided a copy of such regulation, boundary or change shall be filed in the office of the town, city or borough clerk, as the case may be, and notice of such filing shall have ben published in a newspaper having a substantial circulation in the municipality before such effective date. Whenever a zoning commission shall make any change in a zoning regulation or the boundaries of a zoning district it shall state upon its records the reason why such change is made. All petitions submitted in writing and in a form prescribed by the zoning commission, requesting a change in the boundaries of zoning districts, shall be considered at a public hearing, in the manner provided for establishment of zoning regulations and boundaries, within ninety days after receipt of such petition. The commission shall adopt or deny the bound-

ary changes requested in such petition within sixty days after the hearing. The petitioner may consent to extension of the periods provided for hearing and for adoption or denial or may withdraw such petition. The zoning commission may require a filing fee to be deposited with the commission to defray the cost of publication of the notice required for a hearing. No zoning commission shall be required to hear any petition or petitions relating to the same area or solely to portions of the same area and asking the same changes more than once in a period of twelve months.

Sec. 379d. Appeals from board to court. Any person or persons severally or jointly aggrieved by any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when such decision shall h ve been rendered, take an appeal to the court of c nmon pleas of the county in which such municipality shall be located, which appeal shall be made returnable to such court in the same manner as that prescribed for civil action brought to such court. Notice of such appeal shall be given by leaving a true and attested copy therof with, or at the usual place of abode of, the chairman or clerk of said board. The appeal shall state the reasons upon which it shall have been predicated and shall not stay proceedings upon the decision appealed from, but the court to which such appeal shall be returnable may, on application, on notice to the board and on cause shown, grant a restraining order. The authority issuing the citation in such appeal shall take from the appellant, unless

such appellant be an official of the municipality, a bond or recognizance to said board, with surety, to prosecute such appeal to effect and comply with the orders and decrees of the court. Said board shall be required to return either the original papers acted upon by it, and constituting the record of the case appealed from, or certified copies thereof. The court, upon such appeal, shall review the proceedings of said board and shall allow any party to such appeal to introduce evidence in addition to the contents of the record of the case returned by said board, if said record shall not contain a stenographic report or a complete mechanical recording of the entire proceedings before said board including all evidence presented to it, or, if, upon the hearing upon such appeal, it shall appear to the court that additional testimony is necessary for the equitable disposition of the appeal. The court may take such evidence or appoint a referee or committee to take such evidence as it may direct and report the same to the court, with his or its findings of facts and conclusions of law, which report shall constitute a part of the proceedings upon which the determination of the court shall be made. The court, upon such appeal, and after a hearing thereon, may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from. Costs shall not be allowed against said board unless it shall appear to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from. Appeals from decisions of said board shall be privileged cases to be heard by the court, unless cause shall be shown to the contrary, as soon after the return day as shall be practicable.

Sec. 381d. Appeals from zoning commissions. Appeals from zoning commissions may be taken to the court of common pleas in the manner provided in section 379d.

IV THE FOLLOWING IS THE DECISION RENDERED ON JULY 8, 1958 BY THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

SUPREME COURT OF ERRORS

May Term, 1958

Arthur A. Yurdin et al v. Town Plan and Zoning Commission of the Town of Fairfield et al.

William J. Busser v. Town Plan and Zoning Commission of the Town of Fairfield et al.

Appeals from two decisions of the defendant board changing the zone of certain properties, brought to the Court of Common Pleas in Fairfield County and tried to the court, Johnson, J.; judgments dismissing the appeals, from which the plaintiffs appealed to this court. No error.

Herbert L. Cohen and Austin K. Wolf, with whom were Martin F. Wolf and George A. Saden, for the appellants (plaintiffs) in the first case.

Martin F. Wolf, with whom were Herbert L. Cohen, Austin K. Wolf and George A. Saden, for the appellant (plaintiff) in the second case.

Raymond W. Beckwith, for the appellee (named defendant) in each case.

Samuel E. Friedman, with whom were Arthur Levy, Jr., and, on the brief, Irwin E. Friedman and Albert J. Kleban, for the appellee (defendant Turnpike Associates) in the first case.

Murphy, J. Pursuant to legal publication and duly warned public hearing, the town plan and zoning commission of the town of Fairfield, in executive session on September 26, 1956, unanimously voted to amend the zoning map and zoning districts of the town by changing the zone boundaries of certain areas in the immediate vicinity of the intersection of Black Rock Turnpike and Stillson Road. The plaintiffs are neighborhood property owners and residents. They opposed the changes before the commission and appeal from its decisions to the Court of Common Pleas. From the judgments dismissing the appeals and affirming the action of the commission, the plaintiffs have appealed to this court.

Black Rock Turnpike in this area is a segment of route 58, a main traffic artery extending northwesterly from Bridgeport to Danbury. Stillson Road extends southwesterly from Fairfield Woods Road across Black Rock Turnpike and connects with North Benson Road to provide a direct route from the Stratfield section of Fairfield to the center of town. The principal Merritt Parkway interchange for Fairfield is on the Black Rock Turnpike about a mile and three quarters north of Stillson Road.

We shall treat Black Rock Turnpike in this area as running north and south and Stillson Road east.

and west, in order to simplify the description of the area. These directions accord with the general understanding in the locality as expressed at the public hearing before the commission. Each of the four corners at the intersection is zoned for, and occupied by, business establishments. A bank is located on the southwest corner. The area immediately south of the bank for a distance of more than 1300 feet on Black Rock Turnpike is zoned neighborhood business 1 to a depth of 200 feet. The permitted uses in this zone are more limited and restricted than in a full business zone. The land to the south and west of this area is in a residence zone. Turnpike Associates, Inc., owns 315 feet of the neighborhood business frontage. It petitioned the commission to deepen, on its property, the neighborhood business zone to a depth of 400 feet. A similar petition had been denied the year before. The commission itself proposed extending the neighborhood business 1 zone southerly along Black Rock Turnpike a distance of 110 feet, to a point 80 feet north of Burroughs Road, and extending its depth to 400 feet at the southerly end and to a point on Stillson Road 370 feet west of Black Rock Turnpike and in the rear of the bank property. This proposal was adopted. The denial of the 1955 petition of Turnpike Associates did not preclude the commission from acting as it did. Winslow v. Zoning Board, 143 Conn. 381, 390, 122 A.2d 789.

Joseph T. and Margaret Dolan own the property on the northwest corner of the intersection. The corner lot, fronting 120 feet on Black Rock Turnpike, is zoned for business to a depth of 110 feet on Stillson Road. The area to its north on Black Rock Turnpike for upwards of 1000 feet is similarly zoned but

to a depth of 200 feet. The commission changed the zone of a lot on Stillson Road adjoining the corner lot from residence to business so that the business zone on the turnpike north of Stillson Road would have a uniform depth. In addition, it also changed from residence to neighborhood business 1 property of the Dolans and John H. Halfpenny on Stillson Road immediately west of the 200-foot-deep business zone. This property is 100 feet wide and over 300 feet deep. It provides space for off-street parking for the business area and is a transitional zone from the business zone to the residential property on the west.

The east side of Black Rock Turnpike south of a gasoline station on the southeast corner is zoned neighborhood business from Stillson Road to Burroughs Road, a distance of over 1500 feet. The northeast corner is occupied by an automobile service and gasoline station. The area to the north of it is also zoned for business for several hundred feet. From Fairfield Woods Road on the north to Burroughs Road on the south, both sides of Black Rock Turnpike are lined with business establishments ranging from appliances to upholstering and including most enterprises ordinarily to be found in a community shopping center.

The action of the commission did not constitute spot zoning, as claimed by the plaintiffs. It extended the existing business zone into a residence area by giving that area the same or a more limited business classification. This was in accord with the comprehensive plan and for the general welfare of the community. Levinsky v. Zoning Commission, 144 Conn.

117, 124, 127 A.2d 822; Hills v. Zoning Commission, 139 Conn. 603, 609, 96 A.2d 212.

In argument before this court, great stress was laid by the plaintiffs on the action of the commission in conferring, in executive session following the public hearing, with two of its employees, the planning director and the planning technician, and in considering reports of studies they had previously made for the commission. These reports were part of the commission records. One had been made and submitted to the commission in 1952. Report No. 11, an outline for a business land use plan, was dated February 2, 1955. It was marked as a plaintiffs' exhibit at the commission's public hearing, and its contents were used in presenting the plaintiffs' opposition to the proposed changes. The other report, on the growth of Fairfield, was submitted to the commission on January 17, 1956. The appendix to the plaintiffs' briefs indicates that these reports were discussed by the commission before it acted on the proposed changes. The record does not indicate that either the director or the technician spoke in favor of or opposition to any of the changes, nor does it show any attempt upon their part to influence the commission in its decision. The commission did not exceed its authority or violate any rights of the plaintiffs when it had the reports and population maps explained by the trained personnel who prepared them for the commission. It must be borne in mind that the commission is composed of laymen. That they are entitled to professional, technical assistance in doing the statistical work required to enable them to carry out the responsibilities of their

office is necessarily implied in the legislation creating the commission and outlining its duties.

The only other claim of the plaintiffs which requires attention pertains to a ruling on evidence in the Yurdin case. The plaintiffs offered the testimony of a real estate expert long familiar with the area to show that conditions in the area had not changed since the denial of the 1955 petition of Turnpike Associates. This evidence was submitted because there was no stenographic report or complete mechanical recording of the entire proceedings before the commission. Cum. Sup. 1955, §§ 379d, 381d; Nov. 1955 Sup., § N11; see Village Builders, Inc. v. Town Plan & Zoning Commission, 145 Conn. 218, 220, 140 A.2d 477. The court sustained the objection to this line of testimony. As the action of the commission was taken upon its own proposal for extending the neighborhood business zone and not upon the 1956 application of Turnpike Associates, the exclusion of this evidence was harmless. Furthermore, the rule that zone changes should not ordinarily be made after prior denial of them unless there have been substantial changes in the area does not necessarily apply to a commission when it is acting in a legislative capacity. Winslow v. Zoning Board, 143 Conn. 381, 390, 122 A.2d 789; Suffield Heights Corporation v. Town Planning Commission, 144 Conn. 425, 430, 133 A.2d 612.

The reasons given by the commission for each of its three changes were fully supported by the evidence before it, and the changes are in harmony with both the comprehensive plan and the town plan relating to the development of a community shopping

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 417

ARTHUR A. YURDIN, BEATRICE W. YURDIN, IRVING S. MOORIN and PHYLLIS MOORIN,
Petitioners,

vs.

TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD and TURNPIKE ASSOCIATES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The opinion of the Supreme Court of Errors of the State of Connecticut is reported at 145 Conn. 416, 143 A. 2d 639 (1958). It appears in the Petition, pages 18a-24a.

QUESTION PRESENTED.

Respondents object to the form and content of petitioners' questions presented, and therefore submit the following question in lieu thereof.

Whether the Supreme Court of Errors of the State of Connecticut erred in upholding a decision of the Town Plan and Zoning Commission of the Town of Fairfield in making a change of zone, where, at an executive session following a public hearing, said Commission consulted pertinent reports, maps, and studies previously made at its direction by its own professional technical assistants, and heard verbal explanations of such data by its assistants.

STATUTES AND RULE INVOLVED.

Conn. Gen. Stat., 1955 Supp., Secs. 375d, 379d, are printed in Petition, page 14a ff. Conn. Gen. Stat., Rev. 1949, Sec. 837, and Rules for the Supreme Court of Errors, Sec. 441, are set out in respondents' Appendix, pages 1a-3a.

STATEMENT OF THE CASE.

On August 20, 1956, respondent Turnpike Associates, Inc. petitioned respondent Town Plan and Zoning Commission of the Town of Fairfield for a change of zone of certain property located near the intersection of Black Rock Turnpike and Stillson Road. The Commission, while considering the petition of Turnpike Associates Inc., alternatively proposed a change of zone for a somewhat larger area

surrounding this intersection but including the property of Turnpike Associates, Inc.

On September 19, 1956, the Commission held a duly warned public hearing on both proposals, at which time counsel for petitioners and Turnpike Associates, Inc., presented extensive evidence and argument. Likewise, the Commission heard at great length all other persons claiming to have an interest in the proceedings.

On September 26, 1956, the Commission held an executive session, at which time it rendered a decision changing the zone at the intersection of Black Rock Turnpike and Stillson Road to a neighborhood business classification in accordance with its own proposal. Two professional technical assistants, full-time employees of the commission, attended the executive session and discussed and explained various reports on population, residential growth, industrial land use, topographical surveys, surveys of the metropolitan area, population studies, and other materials prepared and assembled by these professional technical assistants at the direction of and for the use of the Commission. Likewise, the Commission and its assistants discussed three alternate plans for the development of a shopping center on Black Rock Turnpike. Thereupon, the Commission exercised the legislative function delegated to it by statute and changed the zone in question.

Petitioners then appealed the Commission's decision to the Court of Common Pleas for Fairfield County, pursuant to Conn. Gen. Stat., 1955 Supp., Sec. 379d. That Court upheld the decision of the

Commission in all respects, including its right to rely in part upon materials prepared for it and explained to it by its planning staff.

Petitioners then appealed to the Supreme Court of Errors of the State of Connecticut, which upheld the decision of the Commission and the lower court, stating in its opinion that the Commission did not violate any rights of the petitioners when it considered reports and other data prepared under its direction by its trained personnel. The Supreme Court of Errors expressly noted that the Commission staff members did not speak in favor of or in opposition to any of the proposals, nor did they attempt in any way to influence the decision of the Commission. The Supreme Court of Errors concluded by stating that the Commission was "entitled to professional technical assistance in doing the statistical work required to enable them to carry out the work of their office . . ."

Petitioners failed to move for rehearing before the Supreme Court of Errors of the State of Connecticut as permitted by Rules for the Supreme Court of Errors, Sec. 441, and have since petitioned this Court for a writ of certiorari. (Appendix, pages 2a-3a).

ARGUMENT.

I.

The Decision of the Supreme Court of Errors of the State of Connecticut Was Correct.

The respondents respectfully submit that this Court should refuse a writ of certiorari for the reason that the decision of the Supreme Court of Errors of the State of Connecticut was unquestionably correct in all respects.

The General Assembly of the State of Connecticut many years ago enacted an enabling statute permitting Connecticut municipalities to exercise zoning powers through a zoning commission. Conn. Gen. Stat., Rev. 1949, Sec. 837, (Appendix, pages 1a-2a), authorizes such commissions to exercise the legislative function of enacting zoning regulations governing land uses. The Supreme Court of Errors of the State of Connecticut upheld the constitutionality of a similar statute, **State v. Hillman,** 110 Conn. 92, 147 Atl. 294 (1929), relying upon **Euclid v. Ambler Realty Co.,** 272 U.S. 365 (1926). Under Conn. Gen. Stat., 1955 Supp., Sec. 375d, a commission may establish, amend, or repeal regulations and boundaries after "a public hearing . . . at which parties in interest and citizens shall have an opportunity to be heard." Under this statutory scheme, the General Assembly has delegated to the municipalities the right under the police power to legislate local zoning regulations and boundaries through a zoning commission. The statute requires a hearing prior to the exercise of the legislative or rule-making function,

but it clearly does not contemplate an adversary proceeding wherein parties are entitled to be confronted with witnesses, to hear all evidence on which a decision may issue, to cross-examine, and to benefit from the requirements of procedural due process, imposed by all courts including the Supreme Court of Errors of the State of Connecticut, in quasi-judicial administrative proceedings as distinct from rule-making. The statute merely requires the commission to hold a hearing so that parties in interest may express opposition to or approval of proposed zoning regulations and boundaries. A party in interest is not entitled to an adversary proceeding on a change of zone. He is simply entitled to an opportunity to be heard. The statutory responsibility for the ultimate legislative decision as to regulations and boundaries rests with the commission. The statute charges the commission with the duty of providing a zoning system for the municipality, and in that capacity they must examine and study local land use problems and formulate regulations to encourage the most appropriate use of land in the municipality. They do not exercise a quasi-judicial function and are not required under state or federal law to confront opponents of a proposed zone change with all evidence upon which they may base their legislative decision.

This Court has held that a party in interest has no right whatsoever, under the Fifth Amendment, to be heard before an administrative agency exercises its rule-making power, **Bowles v. Willingham**, 321 U.S. 503, 519 (1943):

> "It is finally suggested that the Act violates the Fifth Amendment because it makes no pro-

vision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia . . . We agree with the Emergency Court of Appeals . . . that Congress need not make that requirement when it delegates the task to an administrative agency . . . "

The decision of **Bi-Metallic Investment Co. v. State Board of Equalization,** 239 U.S. 441, 445 (1915), applies the same rule to administrative proceedings under state law where the challenge arose under the Fourteenth Amendment:

> "Where a rule of conduct applies to more than a few people, it is impractical that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General Statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

If the Fifth and Fourteenth Amendments do not require a hearing before the exercise of the legislative discretion in making rules, then clearly the decision of the Supreme Court of Errors of the State of Connecticut in defining the rules for legislative action

by the Commission was correct and should not be overruled by this Court.

Petitioners cite no authority in their petition where any court has required a confrontation of all witnesses and evidence by a legislative body in a rule-making case. In the Supreme Court cases cited by petitioners, the issues involved rate making, applications for permits, longshoreman's compensation matters, railroad trackage facilities, etc. All cases involve a quasi-judicial determination of adversary proceedings. None involves the rule-making power.

Likewise, the Connecticut authorities cited involve chiefly appeals from variances, special exceptions, waivers, or approval of subdivisions by boards of zoning appeals and planning commissions. They again do not involve the rule-making power of the zoning commission. That question, as a matter of Connecticut law, was decided in favor of the respondents in the present case, and should not be reviewed by this court.

Therefore, petitioners respectfully submit that this case was correctly decided on the merits by the Supreme Court of Errors of the State of Connecticut and should not now be reviewed by this Court.

II.

The Supreme Court of the United States Should Not Consider the Question of Constitutionality of Conn. Gen. Stat., Sec. 375d, Because Petitioners Failed to Raise This Claim in the Supreme Court of Errors of the State of Connecticut.

Respondents respectfully submit that this Court should refuse to consider petitioners' Question Two, because petitioners never raised the issue in any court of the State of Connecticut. They now claim, for the first time in any court, that Conn. Gen. Stat., 1955 Supp., Sec. 375d, violates Article 14, Section 1, of the Constitution of the United States.

Petitioners' jurisdictional statement asserts only that the doings of the respondent Town Plan and Zoning Commission in executive session allegedly violated petitioners' federal constitutional rights, and they do not claim in their jurisdictional statement that they raised the question of constitutionality of Sec. 375d at any stage of the proceedings before the courts of the State of Connecticut. They did not assign this question as error in their appeal to the Supreme Court of Errors of the State of Connecticut (Record, page 11), and the issue was neither briefed, argued nor decided by that Court. Furthermore, by their own admission on pages five and six of their petition for writ of certiorari, petitioners did not seek rehearing on any question involved in the judgment of the Supreme Court of Errors of the State of Connecticut although they had a right to do so under Connecticut practice. The record clearly indicates that the issue of constitutionality of Sec. 375d is being raised for the first time in this Court.

This precise issue was decided adversely to these petitioners in **Adler v. Board of Education,** 342 U.S. 485, 496 (1951):

> " . . . Without raising in the complaint or in the proceeding in the lower courts the question of the constitutionality of Section 3021 of the

Education Law of New York, appellants urge here for the first time that this Section is unconstitutionally vague. The question is not before us. We will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so."

Therefore, respondents respectfully submit that this Court should not decide petitioners' Question Two pertaining to the constitutionality of Sec. 375d.

III.

The Supreme Court of the United States Should Not Review the Decision of the Supreme Court of Errors of the State of Connecticut Because the Petition for Writ of Certiorari Does Not Establish Special and Important Reasons for so Doing.

Respondents further contend that this Court should refuse to consider the decision of the Supreme Court of Errors of the State of Connecticut for the reason that petitioners do not set forth special and important reasons for the Supreme Court of the United States to review the decision of the Supreme Court of Errors of the State of Connecticut, and do not raise a federal question of substance within the meaning of Supreme Court Rule 19.

Nowhere in their reasons for granting writ of certiorari do petitioners allege that this case presents a federal question of substance, and that special and important reasons exist for this Court to grant the writ. Petitioners devote their entire brief to the erroneous claim that the decision of the Supreme

Court of Errors of the State of Connecticut was wrong. They do not once argue to this Court why it should issue a writ of certiorari and review the case.

As respondents have pointed out in Paragraph I of this Argument, this case not only does not raise a federal question of substance within the meaning of Supreme Court Rule 19, but, in fact, it raises no federal question whatsoever. The authority there cited clearly indicates that there is no requirement of hearing under either the Fifth or Fourteenth Amendments of the Constitution of the United States where an administrative agency engages in the rule-making function. The question presented by this case is one of purely state law, already correctly decided in the Connecticut courts.

Furthermore, petitioners cite no case which indicates that the Supreme Court of Errors of the State of Connecticut decided this case in such a manner as to conflict with the probable decision of this Court. Indeed, the Supreme Court of Errors of the State of Connecticut, decided this case exactly in accord with existing federal precedent.

Likewise, the question presented involves a purely local matter, establishing rules of procedure for a municipality exercising zoning authority delegated to it by the state. Such question involves only a very few litigants in the instant case, and it has little or no bearing on other litigation in other states.

Finally, the question of zoning is primarily one of delegation of the police power by the several states to their municipalities, and it remains purely a mat-

ter of state concern, not warranting the review and jurisdictional supervision of the Supreme Court of the United States.

Petitioners have stated no reasons why this case is so important that it should receive a review by this Court. Respondents respectfully contend that not only was the case correctly decided by the courts below, but that it raises no federal question or matter of special importance warranting a review by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Conn. Gen. Stat., Rev. 1949, Sec. 837:

"The zoning commission of each city, town or borough is authorized to regulate the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes; and the height, size and location of advertising signs and billboards within the limits of such city, town or borough. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings or structures throughout each district, but the regulations in one district may differ from those in another district. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population and to facilitate the adequate provision for transportation,

water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

Rules for the Supreme Court of Errors, Sec. 441:

"A motion for reargument will not be entertained unless filed in writing within ten days from the date when the decision is announced, provided, when the decision is announced in July or August the motion may be filed within the first ten days of September, if the party desiring to make the motion, within ten days after the decision is announced, files a notice of his intention to file such a motion. The motion and the notice, if any, shall be filed with the reporter of judicial decisions and eight copies shall be filed with the clerk of the court where the case was tried, who shall send one copy to each of the justices of the supreme court, one copy to the clerk of this court for Hartford County, unless the notice or motion is filed with him, and one copy to opposing counsel; and the clerk of the court where the judgment was rendered shall also notify the reporter of judicial decisions that the copies have been filed with him. The motion shall state briefly the grounds for asking a reargument and need not be printed.

"Unless the chief justice shall otherwise direct, all proceedings to enforce or carry out the

judgment shall, upon the filing of a notice, be stayed until the time for filing the motion has expired, and, if the motion is filed, until its disposition, and, if it is granted, until the appeal is finally determined.

"If such a motion is granted, the clerk of this court in the county where the judgment was rendered shall give notice to the parties and the case will be assigned for hearing on the next day for the assigning of cases, unless it is continued by stipulation or order of the court."